

United States Court of Appeals
for the eighth circuit

No. 96-4135

United States of America, *
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 * Appeal from the United
States *
 * District Court for the
Western *
 * District of Missouri.
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Bruce C. Pompey, *
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Appellant. *

Submitted: June 10, 1997

Filed: August 1, 1997

Circuit Before BOWMAN, FLOYD R. GIBSON, and MORRIS SHEPPARD ARNOLD,
 Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

possess Bruce C. Pompey appeals from the sentence imposed on him
§§ following his plea of guilty to a charge of conspiring to
levels heroin with intent to distribute it, in violation of 21 U.S.C.
 841(a)(1), 841(b)(1)(C), and 846. Mr. Pompey believes that the
that district court erred in increasing his offense level by two
to for obstructing justice pursuant to U.S.S.G. § 3C1.1. His plea
that agreement with the government stated that "[t]he parties agree
 there are no adjustments to be made for obstruction, pursuant
 § 3C1.1," and Mr. Pompey maintains, and the government admits,
 the

government provided information to the probation officer
preparing the presentence report that Mr. Pompey put pressure on his
sister not to testify against him, thus furnishing the basis for the
the district court's upward adjustment. Mr. Pompey characterizes
for government's action as a breach of the plea agreement and asks
sentence its specific enforcement, either by remanding for resentencing
without the upward adjustment or by imposing a specific
ourselves. We affirm the district court.(1)

We begin our consideration of this case with the
observation that the portion of the plea agreement involved in this case
does not promise anything. The words are declaratory, not
promissory. They might simply be, and are probably best construed as,
statements of law, and, moreover, they are followed immediately by the
only declaration that "[t]he defendant understands [that] these
calculations and estimates are agreements between the parties
and that the Court is not bound by them."

Mr. Pompey argues, however, that the words fairly imply a
adjustment in promise on the government's part not to seek an upward
discharged his sentence for an obstruction of justice. The government
seemingly agrees with this position, but believes that it
that its obligation by not requesting the upward adjustment at the
sentencing hearing. Mr. Pompey, however, evidently maintains
the government's obligation under the agreement extended to the
court point that it was not supposed to supply information to the
that might support a finding that he obstructed justice.

We are not disposed to imply such a promise from the words
of the plea agreement, not just because we think, although we do,
that it would be difficult to argue that they will support such an
parties implication, but also because it is not to be supposed that
to a plea agreement would contract to keep information relevant

to
kind

sentencing from the court. We therefore decline to imply the
of promise that Mr. Pompey

States (1) The Honorable D. Brook Bartlett, Chief Judge, United
District Court for the Western District of Missouri.

believes the words of his plea agreement will support. Even if we were to do so, we would not be inclined to enforce such a promise specifically, it being contrary to public policy if not to law, and the most relief that we might give Mr. Pompey would be to allow him to withdraw his guilty plea, a remedy that he has specifically eschewed before the court.

Mr. Pompey also argues that the conduct in which he engaged did not amount to an obstruction of justice. U.S.S.G. § 3C1.1 provides for a two-level adjustment to the offense level "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the ... prosecution ... of the instant offense." In this case, Mr. Pompey wrote several letters to his sister urging her not to testify against him, and indicating that he could not be convicted without her testimony. Mr. Pompey points out correctly that he made no threats and that in *United States v. Emmert*, 9 F.3d 699, 704-05 (8th Cir. 1993), cert. denied, 513 U.S. 829 (1994), we upheld denial of an adjustment for obstruction of justice when the defendant had admonished a government witness to "stay strong" and "be quiet." But we did so because we believed that the sentencing court correctly concluded that the defendant's statement was not sufficiently unambiguous to warrant an adjustment. Mr. Pompey's letters, in contrast, are hardly ambiguous. In them, he repeatedly urges his sister and coconspirator Alicia Pompey not to testify against him. We think that this is a clear attempt to impede her testimony and thus impede the administration of justice. The public is entitled to the truthful testimony of citizens who witness crimes, and Mr. Pompey's letters can easily be read as encouraging his sister to make herself unavailable when her testimony was needed.

Mr. Pompey argues that he did no more than a lawyer might have done in advising a client to invoke her Fifth Amendment right to remain silent. It is a sufficient answer to this argument, although there are others as well, that one of Mr. Pompey's suggestions was that his sister plead guilty "but don't come to trial against us." In such

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a circumstance, having already pleaded guilty, Ms. Pompey would
longer be entitled to the protection of the Fifth Amendment.

A true copy.

Attest:

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